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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1929

No. 261

WILLIAM MILLER, *Petitioner*,

vs.

H. J. McLAUGHLIN, Secretary of the Department of Agriculture for the State of Nebraska, and FRANK O'CONNELL, Chief Game Warden for the State of Nebraska.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF FOR THE PETITIONER

A. HENRY WALTER,
SEYMOUR L. SMITH,
Counsel for Petitioner.

701 Smith Bldg.,
815 15th Street N. W.,
Washington, D. C.

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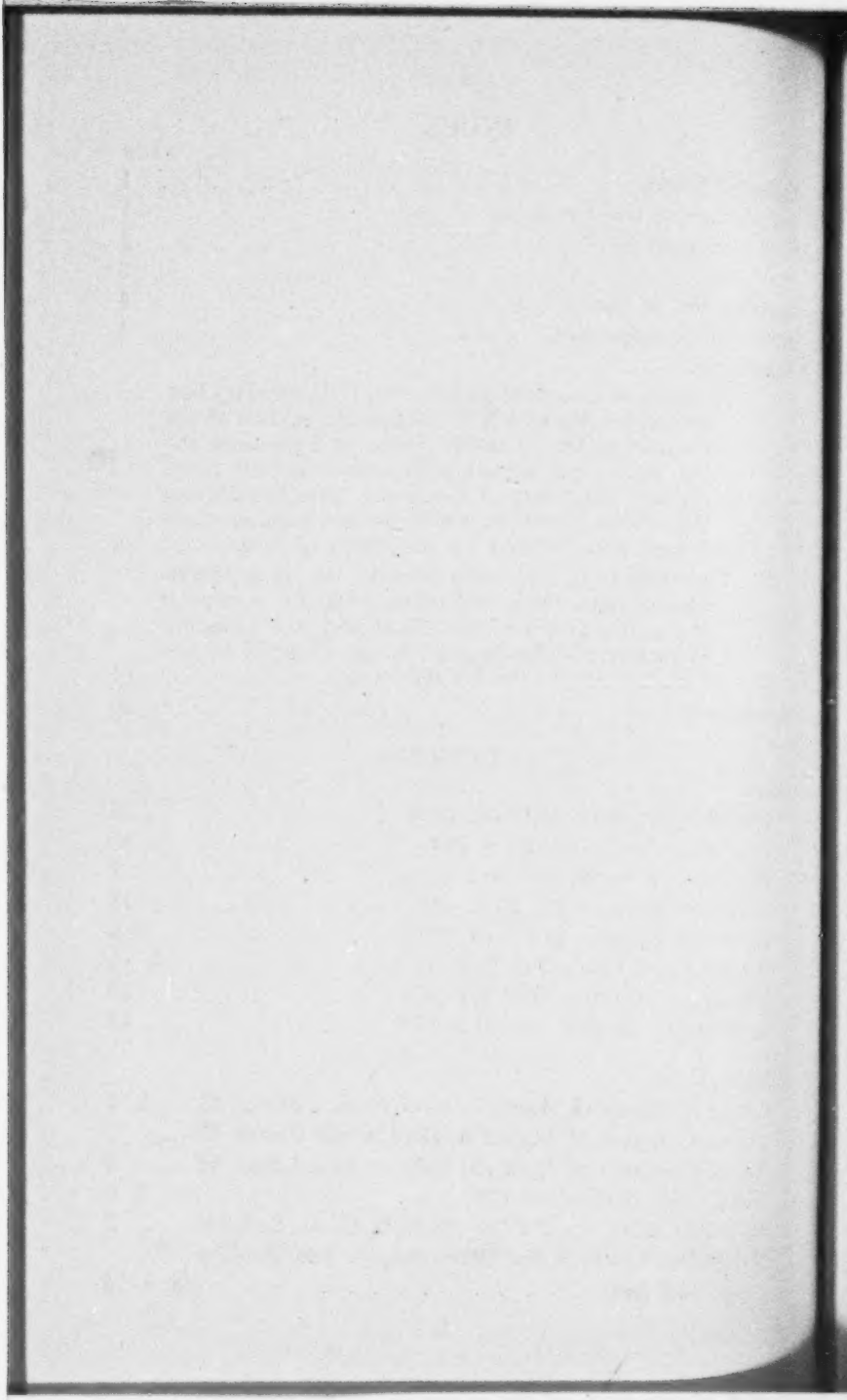

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OPINIONS BELOW

The opinion of the Supreme Court of Nebraska is not yet reported, but it is found at pages 34-39 of the Record. No opinion was rendered by the District Court when the injunction was granted (R. 9).

JURISDICTION OF THIS COURT

The judgment of the Supreme Court of Nebraska was entered March 12, 1929 (R. 33). A motion for rehearing was overruled by that Court April 27, 1929 (R. 39). Peti-

tion for *certiorari* was filed on July 26, 1929, and was granted October 21, 1929.

The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925. *28 U. S. C. A., Section 344.*

STATUTES INVOLVED

Section 3 of the Act of Congress of March 3, 1845, c. 48, 5 Stat. 743, Provides:

> "That the said State of Iowa shall have concurrent jurisdiction on the river Mississippi and every other river, bordering on the said State of Iowa, so far as the said rivers shall form a common boundary to said State, and any other State or States now or hereafter to be formed or bounded by the same: such rivers to be common to both."

The Act of Congress of August 4, 1846, c. 82, 9 Stat. 52, provides:

> "That the following shall be, and they are hereby, declared to be the boundaries of the State of Iowa * * * up the middle of the main channel of the said Missouri River to a point opposite the main channel of the Big Sioux River, according to Nicollet's map."

Section 2 of the Act of Congress of April 19, 1864, c. 49, 13 Stat. 47, provides:

> "That the said State of Nebraska shall consist of all the territory included within the following boundaries, * * * down the middle of the channel of said Missouri River, and following the meanderings thereof, to the place of beginning."

Section 1747 of the Code of Iowa (R. 6, 11) provides:

> "It shall be lawful for any person to take from the Mississippi or Missouri Rivers, within the jurisdiction of the State, any fish with nets or seines upon procur-

ing from the State game warden an annual license for the use of such nets and seines."

Chapter 126, Section 10 (pp. 343, 344), *Laws of Nebraska for 1927*, provides:

> "No person shall take or attempt to take any fish except minnows from the waters within the State of Nebraska with nets, traps or seines. * * * The possession of any and all seines, except minnow seines, as provided in Section 7356, Compiled Statutes of Nebraska for 1922, as amended, nets or traps, except as authorized by the Department of Agriculture, shall be unlawful."

STATEMENT

The petitioner herein filed a petition in the District Court for Lancaster County, Nebraska, "on behalf of himself and all other persons similarly situated," praying that the defendants be restrained and enjoined from enforcing the said Nebraska statute prohibiting the taking of fish with nets, traps or seines.

Petitioner pleaded the law of Iowa, *supra* (R. 6), and alleged *inter alia* (1) that he is the owner of certain nets, traps and seines purchased before the passage of the purported law of Nebraska making their possession illegal (R. 2); (2) that he plans to use and will use said nets, traps and seines within the State of Iowa pursuant to its said law (R. 6); (3) that the aforesaid statute of Nebraska is null, void and unconstitutional in that it violates Section 1 of Article XIV, Sections 1 and 2 of Article IV and Section 8 of Article I of the Constitution of the United States (R. 4, 5); (4) that the defendants are the persons charged with the enforcement of the said law and are about to enforce the same to the damage of the plaintiff (R. 5), and (5) that plaintiff is without an adequate remedy at law (R. 5).

By their joint answer, defendants admitted the facts

alleged in the petition, except defendants alleged that plaintiff uses his nets, traps and seines on the Missouri River and elsewhere in the State of Nebraska (R. 7). The law of Iowa, as pleaded, was not admitted but it was agreed by counsel that the law of Iowa is as alleged in plaintiff's petition (R. 11).

Upon trial the District Court found the issues of law and fact in favor of the plaintiff and granted a permanent injunction (R. 9).

Upon appeal to the Supreme Court of Nebraska the decree was reversed on the ground that the statute challenged by plaintiff was not repugnant to the Act of Congress granting concurrent jurisdiction over the Missouri River to Iowa and Nebraska, even though Iowa had not concurred in the attempted legislation (R. 38), and that the provision that the possession of nets, traps and seines should be unlawful was a valid exercise of the State's police power and not violative of plaintiff's constitutional rights (R. 39).

SPECIFICATION OF ERRORS

1. The Supreme Court of Nebraska erred in holding that the grant by Congress of concurrent jurisdiction over the Missouri River to Iowa and Nebraska does not prevent the State of Nebraska from prohibiting the taking of fish from that river in a manner sanctioned and licensed by the State of Iowa.

2. The Supreme Court of Nebraska erred in holding that the provision that the possession of nets, traps and seines should be unlawful is a valid exercise of the police power and is not violative of the provisions of the Constitution of the United States.

SUMMARY OF THE ARGUMENT

I. By Acts of Congress the boundary line between the States of Iowa and Nebraska is the middle of the channel

of the Missouri River and the two States are given concurrent jurisdiction on that river. Each State has only such rights in and on the river as were granted by Congress and Nebraska has no greater right of property in, or control over, the river than has Iowa. Nebraska cannot prohibit the taking of fish from the river in a manner which Iowa affirmatively sanctions and licenses.

II. The attempt of Nebraska to make the mere possession of nets, traps and seines unlawful is beyond the police power of the State and is a violation of property rights secured to the plaintiff by the Constitution of the United States. The nets, traps and seines have no inherently dangerous or harmful characteristics such as might bring them within the power of prohibition. That the nets might be lawfully used on the Iowa side of the river (as plaintiff alleges he plans to use and will use them) is conceded. If the prohibition of fishing be valid, its enforcement does not require, nor does it warrant, such a confiscation of property.

ARGUMENT

I

The Acts of Congress establishing the boundary line between Iowa and Nebraska as the middle of the channel of the Missouri River, and granting the two States concurrent jurisdiction on that river, prevent the State of Nebraska from prohibiting the taking of fish on the river in a manner sanctioned and licensed by the State of Iowa.

The States of Nebraska and Iowa are given concurrent jurisdiction over that part of the Missouri River which forms a common boundary between the two States by the following Act of Congress of March 3, 1845:

> "The said State of Iowa shall have concurrent jurisdiction on the river Mississippi and every other river bordering on the said State of Iowa, so far as the said rivers shall form a common boundary to said State, and any other State or States now or hereafter to be formed or bounded by the same; such rivers to be common to both." (C. 48, 5 Stat. 743.)

The boundary line between the two States is the thread of the channel of the Missouri River (c. 49, 13 Stat. 47).

The State of Iowa *permits, approves and licenses* the taking of fish from the Missouri River by means of nets, traps and seines, as follows:

> "It shall be lawful for any person to take from the Mississippi or Missouri Rivers, within the jurisdiction of the State, any fish with nets or seines upon procuring from the State game wardens an annual license for the use of such nets and seines." (*Section 1747, Code of Iowa.*)

In the year 1927, the Nebraska State Legislature enacted a law prohibiting the taking of fish by means of nets, traps or seines, as follows:

> "No person shall take or attempt to take any fish except minnows from the waters within the State of Nebraska with nets, traps or seines. * * * The possession of any and all seines, except minnow seines, as provided in Section 7356, Compiled Statutes of Nebraska for 1922, as amended, nets or traps, except as authorized by the Department of Agriculture, shall be unlawful." (Laws of Nebraska for 1927, Chap. 126, Sec. 10, pp. 343-4.)

Thus the question arises as to whether in the absence of the assent of Iowa, and in the face of the positive *sanction* by that State of the taking of fish by nets and seines from the Missouri River, over which both Iowa and Nebraska exercise concurrent jurisdiction, Nebraska may prohibit the taking of fish in the same manner from waters of the Missouri River lying within the territorial limits of Nebraska.

The precise question presented has not heretofore been determined by this Court. It is believed that the case decided by this Court, most nearly in point, is that of *Nielson vs. Oregon*, 212 U. S. 315, in which it was held that the State of Oregon cannot, by virtue of its concurrent

jurisdiction over the Columbia River, *make criminal* the operation of a purse net in that river within the territorial limits of the State of Washington, under authority and license from that State. In that case the alleged offense was not *malum in se*, but was merely *malum prohibitum* by the law of Oregon. So it is in this case. The act made *malum prohibition* by the law of Nebraska is sanctioned and licensed by the State of Iowa.

With reference to this point this Court said:

> "Where an act is *malum in se*, prohibited and punishable by the laws of both states, the one first acquiring jurisdiction of the person may prosecute the offense, and its judgment is a finality in both states, so that one convicted or acquitted in the courts of the one state cannot be prosecuted for the same offense in the courts of the other * * *.
>
> The present case is not one of the prosecution for an offense *malum in se*, but for one simply *malum prohibitum* * * *.
>
> The plaintiff in error was within the limits of the state of Washington, doing an act which that state in terms authorized and gave him a license to do. Can the state of Oregon, by virtue of its concurrent jurisdiction, disregard that authority, practically override the legislation of Washington, and punish a man for doing within the territorial limits of Washington an act which that state had specially authorized him to do? We are of opinion that it cannot."

While pointing out the necessity for confining itself to the decision of the precise question, the Court stated that:

> "Whether, if the act of the plaintiff in error had been done within the territorial limits of the state of Oregon, it would make any difference, we need not determine * * *. It is enough to decide, as we do, that, for an act done within the territorial limits of the state of Washington, under authority and license from that state, one cannot be prosecuted and punished by the state of Oregon. There is little authority upon this precise question, but see Re Mattson, U. S. Circuit

Court for the District of Oregon, 69 Fed. 535, and *Ex parte* Desjeiro, same court, 152 Fed. 1004."

In re Mattson, 69 Fed. 535, dealt with the right of Oregon to punish under its penal statute an act committed on the Washington side of the Columbia River, over which river both Oregon and Washington exercised concurrent jurisdiction. A number of cases involving jurisdiction were discussed in the opinion, and the Court laid down a very definite rule of construction of the phrase "concurrent jurisdiction" in saying:

> "The word concurrent, when applied to the jurisdiction of Oregon to enact penal laws for the Columbia River, can only mean the power to enact such criminal statutes as are agreed to or acquiesced in by the state of Washington, or as are already in force within its jurisdiction."

In the more recent case of *Ex parte Desjeiro*, 152 Fed. 1004, Desjeiro, an alien, had been committed under an Oregon statute prohibiting an alien taking salmon or sturgeon fish from the waters of the State. The complaint alleged the unlawful taking of fish from the *waters of Oregon*, to wit, the Columbia River.

In reversing the conviction, the Court said:

> "And the vital and pivotal question involved is whether the statute under which the petitioners were convicted is invalid and inoperative by reason of non-concurrence there by the Legislature of the State of Washington" (152 Fed. 1006).
>
> "The law, as appears from a reading of the act, was general in its operation, as it is here, and designed to apply alike in all parts of the state, and concurrently with Washington over the waters of the Columbia River. If the act was void as it respects a citizen of the state of Washington, being general, it is void as to every other citizen whether of the state of Washington or California, or elsewhere. It is the act of concurrence between the two states, in the exercis

of legislative authority, that validates the act and gives it the force of law, and, unless there is a concurrence or assent by both states to the enactment, it cannot have that force * * *."

"It is the offense of fishing without being a resident of the state; and, the state of Washington not having concurred in this legislation, the act is void as to all persons, whether they be citizens of Washington or California, and is within the doctrine of the Mattson Case" (152 Fed. 1007).

The situation in the *Desjeiro Case* is identical with that in this case. It was held that Oregon had no power to prosecute for an act committed *within its own boundaries* on waters over which it had jurisdiction concurrent with the State of Washington, unless Washington had concurred in making that act a punishable offense. If that principle be correct, obviously Nebraska's attempt to prohibit seining in the Missouri River within its own boundaries is frustrated not only by a passive lack of assent on the part of Iowa, but also by Iowa's affirmative approval of that method of fishing. The reference to the *Desjeiro Case* in the opinion of this Court in *Neilsen vs. Oregon, supra,* certainly does not indicate disagreement with the principle of law there enunciated.

The Supreme Court of Nebraska apparently relied on the holding of this Court in *Nicoulin vs. O'Brien,* 248 U. S. 113, as supporting its conclusion that the grant of concurrent jurisdiction to Iowa and Nebraska did not necessitate a concurrence by Iowa in the statute of Nebraska involved herein (opinion R. 38). But the facts are not analogous and we submit that the holding of the Court in the *Nicoulin Case* has no application to the instant case.

In the *Nicoulin Case* it was contended before this Court that by the provision of the Virginia Compact the *use and navigation* of the Ohio River should be free and common and that jurisdiction of Virginia and the proposed State (Indiana) should be concurrent. The territorial limits of Kentucky (as successor to the rights of Virginia) extend

across the river to the low-water mark on the northerly shore. Before the Virginia Compact, Virginia had complete jurisdiction and property rights in and on the Ohio River. Virginia released only such portion of its rights as were *expressly conveyed* by the terms of the Compact. It seems obvious that in retaining the waters of the Ohio River within its boundaries, Virginia proposed to retain control and jurisdiction over all *property rights* in that river it had previously held, and that the grant of concurrent jurisdiction was not intended to, and did not, relinquish control over *property in the river.*

The distinction between the two cases clearly appears upon an examination of the opinion of the Court of Appeals of Kentucky in *Nicoulin vs. O'Brien,* 172 Ky. 473, in which the Court said:

> "The cession then of Virginia's domain 'northwest of the Ohio River' being clearly exclusive of that stream, left her proprietorship unaffected; and, Kentucky's proprietorship upon its creation as a state, was the same. *McFarland v. McKnight, supra; Blanchard v. Porter,* 11 Ohio, 138.
>
> It has become a well recognized rule of construction that where a river separates two states, if one of them was the original proprietor of the lands on both sides, and ceded the land on the opposite side, the grant running from the river, the original proprietor is deemed to have retained the stream, unless the contrary intent clearly appears; but, where neither state was the original proprietor, then the territory of each runs to the middle line of the main channel, in the absence of a contrary agreement."

* * * * * * *

> "The proprietorship of Kentucky, and its attendant jurisdiction are subject only to the limitations that were laid thereon in the compact between Virginia and Kentucky. That compact was finally embodied in an Act of General Assembly of Virginia, passed December 18th, 1789, and contains the terms and conditions upon

which Kentucky was erected into an independent state. The seventh clause of the compact reads as follows:

> 'The use and navigation of the river Ohio, so far as the territory of the proposed state, or the territory which shall remain within the limits of this Commonwealth, lies thereon, shall be free and common to the citizens of the United States, and the respective jurisdictions of this commonwealth and of the proposed state, on the river as aforesaid, shall be concurrent only with the states which may possess the opposite shores of the said river.' *13 Hening's St. Lar., p. 19; Carroll's Ky. Sts. 1915, p. 29.*"

* * * * * * *

> "So, the limitation upon Kentucky's exclusive ownership and jurisdiction of the Ohio river is to be measured by the meaning we shall give the words 'concurrent jurisdiction' as used in the Virginia Compact, *supra.*
>
> There have been many cases in which the words 'concurrent jurisdiction' have been defined generally, or defined in connection with particular facts. A majority of these decisions have arisen in cases where the middle thread of the stream constituted the boundary between states, thus leaving to each state the ownership of a portion only of the bed of the river.
>
> The peculiar character, however, of the Ohio river, lying, as it does, entirely within the boundary of the State of Kentucky, clearly differentiates it from other dividing waters, such as the Columbia, the Mississippi, the Missouri, and the Hudson rivers, whose middle threads divide the territories of the respective states occupying their opposite shores."

An examination of the briefs filed here while the case of *Nicoulin vs. O'Brien, supra,* was before this Court reveals that Kentucky relied upon its property rights in the Ohio River to sustain the validity of the statute there contested. The first four propositions argued by the defendant in error (a justice of the peace of Kentucky, before whom Nicoulin was convicted of a violation of the statute) were as follows:

"1. The boundary of Kentucky is the low water mark on the Indiana side of the Ohio River."

"2. The State owns navigable waters within its territorial limits and owns the land under them and the fish therein."

"3. As the fish are the property of Kentucky the state may pass laws regulating the taking of them."

"4. Therefore, Kentucky has full power to regulate the taking of fish in its waters unless that right has been taken expressly away."

"A. Kentucky has not been deprived of that right unless by the Compact with Virginia."

"(a) The Virginia Compact granted no fishing privileges."

"(b) The only clause which could be in any way construed as hampering Kentucky's rights, is the one conferring concurrent jurisdiction."

We believe that the following quotations from the brief of the defendant in error fairly set forth the argument upon which it hoped to secure an affirmance by this Court:

"The peculiar character of the Ohio River, lying, as it does, entirely within the boundaries of the State of Kentucky, clearly differentiates it from other dividing waters, such as the Columbia, Mississippi, Missouri and Hudson Rivers, whose middle threads divided the territories of the respective States occupying their opposite shores" (p. 27, Brief of defendant in error).

"* * * the law in that case (*Neilson vs. Oregon*, 212 U. S. 320) is not conclusive in the decision of the case at bar, as the concurrent jurisdiction which was given to Washington and Oregon is not the same as the jurisdiction that Kentucky has on the Ohio River, by *reason of the difference of circumstances surrounding the granting* of it, as well as the fact that while Washington and Oregon each own to the *middle of the stream*, the *whole of the Ohio River* lies within the territorial limits of the State of Kentucky" (Brief of defendant in error, p. 32).

But in this case, Nebraska received only such rights in the Missouri River as were expressly granted by the Act

of Congress. Those rights are expressed in the words "Concurrent jurisdiction" and are definitely limited to control or jurisdiction concurrent with Iowa. The reservation to the grantor of sole control for all purposes except "use and navigation," as in the *Nicoulin Case,* does not exist here for the reason that both Iowa and Nebraska have no rights in the Missouri River except such as were derived from a common source, and consequently neither State may claim a jurisdiction over any part of the river superior to the jurisdiction of the other.

That the distinction between "use and navigation" and the *ownership of property rights* in the river existing before, and continuing after, the Virginia Compact was the basis for this Court's decision is indicated by the following language at page 114:

> "And we think it clear that no limitation upon the power of that Commonwealth to protect fish within her own boundaries by proper legislation resulted from the mere establishment of concurrent jurisdiction by the Virginia Compact."

In that case the Court cited *Wedding vs. Meyler,* 192 U. S. 573, in which Mr. Justice Holmes adopted in the opinion at p. 585, the following statement respecting the concurrent jurisdiction of Kentucky and Indiana:

> "Jurisdiction, unqualified, being, as it is, the sovereign authority to make, decide on, and execute laws, a concurrence of jurisdiction, therefore, must entitle Indiana to as much power—legislative, judicial, and executive—as that possessed by Kentucky over so much of the Ohio River as flows between them."

If the word "concurrent" means anything, or imposes any qualification upon the jurisdiction over the Missouri River granted by Act of Congress, even under the strictest interpretation it must be of sufficient import to restrain the attempt of Nebraska to prohibit the doing of an act on the Missouri River when that act has the protection of the laws of Iowa.

II

The Attempt of Nebraska to Make the Mere Possession of Nets, Traps and Seines Unlawful Is Beyond the Police Power of the State and Is a Violation of Property Rights Secured to the Plaintiff by the Constitution of the United States.

The attempt to make unlawful the *mere possession* of nets, traps and seines, without regard to their *use* or *intended use,* is found in the following portion of *Chapter 126, Section 10* (pp. 343-4), *Laws of Nebraska for 1927:*

> "* * * The possession of any and all seines, except minnow seines, as provided in Section 7356, Compiled Statutes of Nebraska for 1922, as amended, nets, or traps, except as authorized by the Department of Agriculture, shall be unlawful."

Thus it appears that it is attempted to make the mere possession of nets, traps and seines unlawful, even though the owner or possessor may use them only in the State of Iowa where their use is legal, or indeed he may not use or plan to use them at all. We submit that this is an unwarranted exercise of the police power, and is in conflict with the Fourteenth Amendment of the Constitution of the United States, which, in part, provides that:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law."

It has been said repeatedly that the police power of a State extends to everything *essential* to the public safety, health and morals. This power may extend to the prohibition of certain classes of property or even to the destruction of property as in the abatement of a nuisance. But the States, when providing by legislation for the protection of

the public health, the public morals or the public safety, are subject to the paramount authority of the Constitution of the United States, and may not violate rights secured or guaranteed to the individual by that instrument. *Mugler vs. Kansas,* 123 U. S. 623.

But no detriment to the public results from the existence of fishing nets or in their possession by an individual. There are certain articles the mere possession of which may be an offense because of their inherently dangerous or harmful character, or because they may be utilized only for an illegal purpose. Fishing nets possess none of these characteristics.

It has been decided that the preservation of game and fish is within the proper domain of the police power, and if nets are *being used* in a manner detrimental to the interests of the public, it is within the power of the legislature to declare them to be nuisances and to authorize their abatement. *Lawton vs. Steele,* 152 U. S. 133. As distinguished from the mere passive existence or possession of a fishing net, a net to come within the prohibition of the statute approved in that case *must have been used* in the violation of the statute enacted for the preservation of fish. In holding the statute constitutional, the Court said at page 139:

> "If nets *were being used* in a manner detrimental to the interests of the public, we think it was within the power of the legislature to declare them to be nuisances, and to authorize the officers of the State to abate them." (Italics ours.)

Under the provisions of the Nebraska statute it is unlawful to store or to possess nets within the territorial limits of the State, even though they never be dipped in its waters, and even though the nets may be lawfully used on the Iowa side of the Missouri River a few hundred yards from the storage racks on the Nebraska side. Such a statute serves no useful purpose and is not within the proper exercise of the police power.

CONCLUSION

Concurrent jurisdiction over the Missouri River was conferred upon Iowa and Nebraska by Act of Congress, and Nebraska cannot prohibit the taking of fish from that river by nets, traps or seines, when that manner of taking fish is affirmatively sanctioned and licensed by the State of Iowa.

The attempt of Nebraska to make the mere possession of nets, traps and seines unlawful is beyond the police power of the State and violates property rights guaranteed to the petitioner by the Fourteenth Amendment to the Constitution of the United States.

WHEREFORE, the decision of the Supreme Court of Nebraska should be reversed.

Respectfully submitted,

A. HENRY WALTER,
SEYMOUR L. SMITH,
Counsel for Petitioner.

701 Smith Bldg.,
815 15th Street N. W.,
Washington, D. C.